



Attorney General

1273 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

November 19, 1990

Melvin R. Bowers, Jr.
Navajo County Attorney
P.O. Box 668
Holbrook, Arizona 86025

Re: I90-099 (R90-139)

Dear Mr. Bowers:

Pursuant to A.R.S. § 15-253(B), we concur with the October 3, 1990 letter of Dennis Weyrauch, Chief Deputy, County Attorney to Joseph M. Landovozo, Superintendent of the White River Unified School District #20, regarding the application of a T.E.R.O. fee on private contractors by the White Mountain Apache Tribe. We concur with Mr. Weyrauch's opinion that private contractors are not excused from paying the T.E.R.O. tax "simply because the tax is paid with governmental funds. . . ." See United States v. New Mexico, 455 U.S. 720, 734-735 (1982). This issue was raised but was not answered because it was not necessary to resolve the questions presented in Ariz. Att'y Gen. Op. No. 186-019. Any suggestion to the contrary from that earlier opinion should be disregarded.

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN
Attorney General

BC:KAP:GYH:bl

WHITERIVER UNIFIED SCHOOL DISTRICT No. 20

P.O. Box 190 Whiteriver AZ 858
(602) 338-4842 Fax (602) 338-5124

SEP 14 REC'D

Dr. Joseph M. Landavazo
Superintendent

Mrs. Fran Curtis
Business Manager

September 12, 1990

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Mr. Dennis Weyrauch
Navajo County Attorney
Governmental Complex
P.O. Box 668
Holbrook, AZ 86025

Dear Mr. Weyrauch:

In 1988 and 1989, the Whiteriver Unified School District entered into a contract with Porter Brothers Construction and Bob Weary Construction respectively to construct buildings for the District.

Both firms were assessed a fee by the White Mountain Apache Tribe referred to as T.E.R.O. fee. Porter Brothers refused to pay the fee based on A.G. Opinion 136-019 and 188-076. Weary Construction paid the fee under protest indicating that if this issue was resolved that this fee was not applicable or legal, that the fee amount would be refunded.

Both firms particularly noted that A.G. Opinion 188-076 specifically applied to "contractors and subcontractors" dealing with the school district (Page 2 of Opinion).

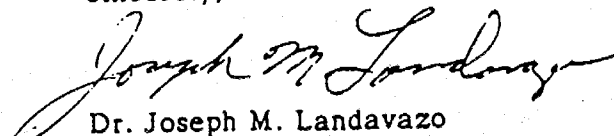
In June 1990, the District instructed A.E. Constructors to add the T.E.R.O. fee via a change order to the present contract in progress. This was necessary as the White Mountain Apache Tribe had, by court order (Tribal Court), prohibited the construction to proceed and the District desperately needs the classroom for the beginning of the 1990-91 school year.

Since the contracts with Porter Brothers and Weary Construction have been closed except for some warranty work and we are in a different fiscal year, may the District pay or reimburse the two firms above for the T.E.R.O. fee? If so, what procedures are to be used?

A judgement was entered against Porter Brothers for the fee in Tribal Court on September 7, 1990.

This issue has been debated for three years now and must be resolved soon as the District has other building needs and must reevaluate its financial commitments/obligations very soon.

Sincerely,


Dr. Joseph M. Landavazo
Superintendent





NAVAJO COUNTY ATTORNEY

P.O. BOX 668 HOLBROOK, ARIZONA 86025 (602) 524-6161 FAX 524-2514

MELVIN R. BOWERS, Jr.
County Attorney

Dennis Weyrauch
Chief Deputy

October 3, 1990

Dr. Joseph M. Landavazo
Superintendent
Whiteriver Unified School District No. 20
P.O. Box 190
Whiteriver, Arizona 85941

RE: Application of T.E.R.O. to Private Contractors

Dear Dr. Landavazo:

You asked whether the White Mountain Apache Tribe was authorized to impose its T.E.R.O. tax on building contractors with whom the school district has entered into construction contracts. I have concluded that private building contractors are subject to the T.E.R.O. tax, notwithstanding the fact that they dealt with the school district.

You have cited Op.Atty.Gen. No. I88-076 for the proposition that contractors and subcontractors dealing with the school district are exempt from the T.E.R.O. fee. My reading of that opinion does not support your position. The Attorney General concurred with Mr. Patton's opinion "that a public school district is not subject to the application of the tribal employment preference law." Op.Atty.Gen. No. I88-076 (emphasis added). The Attorney General's Opinion did not address the application of the tribal employment preference law to contractors and subcontractors dealing with the school district.

The T.E.R.O. taxes at issue here have not been imposed directly on the school district. Instead, they have been assessed against private building contractors, which have entered into construction contracts with the school district. An Indian tribe has the authority to tax private entities doing business on the reservation. See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Op.Atty.Gen. No. 86-019.

It is clear from Op.Atty.Gen. No. I88-076 that the White Mountain Apache Tribe cannot impose its T.E.R.O. tax directly on the school district. That is true because the Whiteriver Unified School District is a political subdivision of the State of Arizona. But the private contractors in this case are not transformed into

Dr. Joseph Landavazo
October 3, 1990
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tax-immune entities merely because they are doing business with a school district, which itself is immune from the tribal taxes. See United States v. New Mexico, 455 U.S. 720, 734-735 (1982). Nor are the private contractors excused from paying the tax "simply because the tax is paid with Governmental funds . . ." Id. at 735. Accordingly, I must differ with Mr. Patton's conclusion that the reasoning of Op.Atty.Gen. No. 186-019 "would apply to contractors and subcontractors dealing with the school district if those funds are solely state funds."

You also asked whether the school district was authorized to reimburse the two construction firms for the T.E.R.O. taxes that have been imposed by the White Mountain Apache Tribe. It is my understanding that the tax originally was included in the Porter Brothers Construction contract, but the school district withheld the amount of the tax from the final payment made to the contractor. In the case of Bob Weary Construction, the school district and the contractor executed a change order to add the tax to the contract amount. Therefore, in both cases, the school district is contractually obligated to reimburse the contractors for the amount of the tax. If the school district has contingency funds or other funds available, those funds should be used to reimburse the contractors. The provisions of A.R.S. §15-907, may be applicable to this situation if the term "unexpected legal expenses" is interpreted to include amounts paid in settlement of contract dispute. If no funds are available in the current fiscal year, the amounts will have to be included as part of next year's budget.

A copy of this opinion is being forwarded to the Attorney General for his review.

Sincerely,



Dennis R. Weyrauch
Chief Deputy County Attorney